



No. 143.

Brief of Purcell for D. C.

Filed Nov. 29, 1897.

IN THE SUPREME COURT

OF THE

UNITED STATES.

WILLIAM W. CONDE and JOHN
C. STREETER,

Plaintiffs in Error,
ag'st

ANSON E. YORK and WALLACE
W. STARKWEATHER,
Defendants in Error.

Points for Defen-
dants in Error.

STATEMENT.

In error to the Supreme Court of the State of New York from a judgment entered on remittitur from the Court of Appeals of the State of New York, affirming a judgment upon an order of the Appellate Division of the Supreme Court of the Fourth Judicial Department of said State, which affirmed a judgment entered after trial at the Jefferson Circuit before Justice McLennan and a jury.

The action was brought in the Supreme Court of the State of New York to recover of the plaintiffs in error \$2,500 in money, of which the defendants in error claimed to be the owners and which the plaintiffs in error had appropriated to their own use, and was first tried at the Jefferson Circuit in December, 1890. At the close of the evidence the Court directed a verdict for the defendants in error for the amount claimed, with interest. From the judgment entered on such verdict the plaintiff in error appealed to the General Term, Fourth Department, where the judgment was reversed on the ground that upon the evidence the question as to which of the parties had the prior assignment of the fund should have been submitted to the jury, and a new trial was ordered.

Reported N. Y. Sup. Ct. Repts 61 Hun, 26.

Upon the second trial this question was submitted to the jury, and a verdict for the defendants in error for the full amount of the claim was rendered. An appeal was again taken to the same General Term, and the judgment was again reversed, on exceptions taken during the trial and to the Judge's charge.

Reported N. Y. Sup. Ct. Repts, 68 Hun, 316.

A third trial was had in March, 1893, which again resulted in a verdict for the defendants in error for the full amount of their claim, with interest.

The plaintiffs in error again appealed to the General Term, where the judgment was affirmed. From the affirmance by the General Term, they appealed to the Court of Appeals of the State of New York, where the judgment was affirmed. Opinion by Ch. J. Andrews, 147 N. Y., 486.

The several opinions of the Supreme Court and Court of Appeals are found in Appeal Book, p. p. 41-52.

STATEMENT OF FACTS.

In the year 1890, the firm of Witherby & Gaffney, of Watertown, N. Y., had a contract with the United States Government by the terms of which they were to furnish material and construct buildings known as "officers quarters" at Sackets Harbor, N. Y.

After this contract was let to Witherby & Gaffney, they purchased from the defendants in error, who were lumber dealers in Watertown, N. Y., under the firm name of York & Starkweather, large quantities of lumber and material for use in the erection of said buildings, and on March 27th, 1890, were indebted to the defendants in error on account of such materials in the sum of \$3,000 and more, and on that day to secure the payment of the said sum they executed and delivered to the said defendants in error an instrument in writing, which is Exhibit 1 in this case, and fully set forth in the complaint, p. 8.

This instrument after reciting the fact of the contract with the government, the indebtedness to the defendants in error for materials used in the construction of said buildings, and that there would be moneys due from the government on the completion of the contract provided as follows :

"Now, therefore, of the moneys due and to be-
" come due us from said government, we do hereby,
" for value received, assign and transfer to said
" York & Starkweather the sum of \$3,000."

The government's paymaster was directed by this instrument to pay \$500 of the above sum to the defendants in error on the next estimate to be made and the balance of \$2,500 on the completion of the contract.

On April 7th, Witherby & Gaffney paid the defendants in error \$500 to apply on the said assignment, but no further payment was ever made by them.

It was admitted on the trial that Witherby & Gaffney executed and delivered the assignment, Exhibit 1, on March 27, 1890, to the defendants in error and that their indebtedness therein stated was correct, that a draft to the amount of \$4,400 to which said assignment related was delivered by the government to Witherby & Gaffney on May 15, 1890, and by them delivered to the plaintiffs in error on that day, that while such drafts were in their hands defendants in error demanded \$2,500 thereof and fully notified the defendants of the terms of said assignment, and that plaintiffs in error refused to pay the same or any part thereof (pp. 19, 20.)

It was also admitted that prior to the time plaintiffs in error received this draft they were fully notified of the assignment to defendants in error (p. 20.)

The plaintiffs in error claimed a prior right to the draft and moneys in question by virtue of an alleged oral assignment thereof made to them by Witherby & Gaffney to secure the payment of certain notes upon which they were liable as endorsers and individual claims they held against them.

Upon the receipt of the money it was used to pay notes to the amount of \$3,200 which plaintiffs in error

had endorsed, and individual claims to the amount of \$600, and \$628 thereof was returned to W. & G

On April 16th, 1890, Witherby & Gaffney executed to the plaintiffs in error an agreement by which they promised to pay off and discharge, from the moneys to be received by them from the government, certain notes endorsed by the plaintiffs in error, then held by the Jefferson County National Bank, and certain individual indebtedness held against them by the plaintiffs in error. This agreement, although appearing under date of April 18th (see case, p. 11) was in fact dated April 16th (case, p. 25). The change of the date is not material.

On April 18th, W. & G. made a written assignment to plaintiffs in error of sufficient of the moneys in question to pay the notes and claims mentioned. (Ex. 5, p. 22.)

PRELIMINARY.

The writ of error herein should be dismissed for want of jurisdiction.

(a) Under the Judiciary Act, Sec. 709 U. S. R. S., it is provided, that a final judgment or decree of the highest court of a state is open to review upon a writ of error, "Where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of * * * the United States and the decision is against the title, right, privilege or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, &c."

The plaintiffs in error make claim to the fund in question by virtue of a transfer executed subsequent to the assignment of the same to the defendants in

error, and set up in their answer that by reason of Sec. 3477 of the Revised Statutes of the United States, the defendants in error, by virtue of their assignment, acquired no title to the fund. So, it will be seen that each of the parties to this record claim title to the fund by assignments to them respectively, made by the Government contractors.

The plaintiffs in error acquired no right or title to the fund by virtue of the section in question, and the decision of the Court of Appeals, as is said by Ch. J. Andrews, "does not affect any right of the defendants (plaintiffs in error) based thereon. Their right, if any, rests upon the transfer of the draft after it came to the hands of Witherby & Gaffney."

The most that can be said of the claim of the plaintiffs in error is, that the defendants in error never acquired any title to the fund by virtue of their assignment.

This claim does not draw into question the validity of the statute under consideration, nor any title, right, privilege of immunity claimed by the plaintiffs in error under such statute. The fact is they have, and can make, no right, title, claim or privilege to the fund in question under said statute, and the highest court of the State of New York so held, this court will not entertain the writ. This was the view taken of the case by the New York Court of Appeals, as we find in the opinion the following: "The judgment we shall render will not, we suppose, be subject to review by the Supreme Court. We do not question the validity of the section in question, nor will our decision affect any right of the defendants (plaintiffs in error) based thereon. Their right, if any, rests upon the transfer

of the draft after it came to the hands of Witherby & Gaffney. They seek to defeat the right of the plaintiffs (defendants in error) under their prior assignment of a portion of the fund and invoke Sec. 3477 to establish that the assignment was void and conferred no right."

(b) It is well settled that in order to give this court jurisdiction to review a judgment of a State Court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be one of the plaintiff in error, and not of a third person only.

Owings vs. Norwood, 5 Cranch, 344.

Montgomery vs. Hernandez, 12 Wheat., 129-132.

Henderson vs. Tennessee, 10 How., 311.

Gilles vs. Little, 134 U. S., 645-650.

Ludeling vs. Chaffee, 143 U. S., 301.

All we have here are different claimants to a fund which was created by Government contractors, and the only real question that either could litigate in the courts of the State of New York or in this court was, who had the highest right or equity to such fund.

It is not enough that the statute was collaterally involved in the disposition of the case, as the true rule is that, in order to give this Court jurisdiction, it must be directly involved (Ch. J. Fuller, in Cook vs. Avery, 147 U. S., 385.)

(c) The rights of the parties to the fund in question were equitable only, and the equity and right of the defendants in error being superior to those of the plaintiffs in error, as decided by all the New

York courts, and this being really the only question involved, the writ should be dismissed.

Prairie State Bank vs. United States, 164 U. S., 227.

(d) While it is true that the State Courts in the disposition of this case passed upon the construction of Sec. 3477 of the Revised Statutes of the United States, we respectfully insist that this was wholly unnecessary and that the only question involved was which party had the prior assignment to the fund in question; and because the courts did so pass upon the construction of the statute if it was unnecessary to do so, and the case was finally disposed of, or could have been disposed of upon an independent ground not involving the construction of the statute, this Court will not entertain the writ, but will dismiss it.

Hammond vs. Conn. Mut. Life Ins. Co., 150 U. S., 633.

Conn. N. Y. & N. E. R. R. Co. vs. Woodruff, 153 U. S., 689.

Eustis vs. Bowles, 150 U. S., 361.

O'Neil vs. Vermont, 144 U. S., 328.

Hammond vs. Johnson, 142 U. S., 73.

Wood Mowing & R. Mach. Co. vs. Skinner, 139 U. S., 293.

(e) Although the writ of error granted by the Chief Judge of the New York Court of Appeals certifies that the construction of the statute under consideration was drawn into question, this statement is not binding upon this Court, and the Court will determine for itself whether such was the fact.

Newport Light Co. vs. Newport, 151 U. S., 527.

POINTS ON MERITS.

I.

The main contention of the plaintiffs in error is that the defendants in error by virtue of their assignment acquired no right to the moneys to be earned by Witherby & Gaffney under their contract with the government, for the reason the assignment was absolutely void, it being prohibited by Section 3477 of the Revised Statutes of the United States. This Section is a re-enactment of an act of Congress approved Feb. 26, 1853, entitled "*an act to prevent frauds upon the Treasury of the United States,*" and declares in substance that all transfers and assignments thereafter made of any claim upon the United States, or any part or share thereof or interest therein, whether absolute or conditional, shall be absolutely null and void unless freely made after the allowance of such claim, ascertainment of the amount due and the issuing of a warrant for the payment thereof; and the case of *Spofford v. Kirk*, 97 U. S. R., 484, is relied upon in support of this position.

In that case *Kirk* was prosecuting a claim against the government through his attorneys for supplies furnished and damages sustained by the U. S. army and before its allowance made orders on his attorneys to different parties for certain of the moneys which he expected would be allowed him. The orders were endorsed by the payees and accepted by the attorneys, and then sold to *Spofford* for value.

Upon this state of facts the Court held that *Spofford* could not recover of *Kirk* who made the orders as the transaction fell within the prohibition of the

statute in question, and laid down the broad rule that the language of the Act was too positive and sweeping to justify a limited construction of it.

Since the decision of *Spofford vs. Kirk*, the same Court has had frequent occasions to pass upon this statute and *has* given a limited and qualified construction, holding in numerous cases that there are assignments of claims against the government which do not come within the prohibition of the statute and that the sole purpose of the statute was to protect the government, and not the parties to the assignment.

Erwin v. The United States, 97 U. S. R., 393.

Goodman vs. Niblock, 103 U. S. R., 556.

Baily vs. United States, 109 U. S. R., 432.

Hobbs vs. McLean, and al, 117 U. S. R., 567.

Freedman's Savings & Trust Co. vs. Shepherd, 127 U. S. R., 494.

Lawrence vs. United States, 8 ct. claims, 253.

Milliken vs. Barrow (C. C.) 63 F. 888.

Barke vs. Davis, (C. C.) 63 F. 456.

(a) In *Erwin vs. The United States*, *supra*, the Court held that the statute did not embrace cases where there was a transfer of title by operation of law, that such cases were not within the evil at which the statute was aimed.

(b) In *Goodman vs. Niblock*, *supra*, it was held that the statute did not embrace the case of a general assignment by an insolvent for the benefit of his creditors. This case deserves especial attention as the Court evidently gave the statute a more extended consideration and arrived at a different, or at least a modified construction than that announced in *Spofford vs. Kirk*. The question arose upon a bill filed to reach trust funds in the hands of

an assignee. A demurrer was interposed which was sustained. An appeal was taken to the Supreme Court, and Justice Miller in delivering the opinion of the Court said: "It is understood that the Circuit Court sustained the demurrer under pressure of the *strong language* of the Court in *Spoofford vs. Kirk*. We do not think, however, that the circumstances of the present case bring it within the one under consideration or the principles there laid down. *That was the case of the transfer or assignment of a part of a disputed claim then in controversy*, and it was clearly within all the mischiefs designed to be remedied by the statute. Those mischiefs, as laid down in that opinion, and the other referred to were mainly two.

First: The danger that rights of the government might be embarrassed by having to deal with several persons instead of one and by the introduction of a party who was a stranger to the original transaction.

Second: That by the transfer of such a claim against the government to one or more persons not originally interested in it the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the Courts or the Congress as desperate cases when the reward is contingent on success, so often suggest.

Both of these considerations, as well as a careful examination of the statute leave no doubt that its sole purpose was the protection of the government and not that of the parties to the assignment."

There is no doubt, Judge Miller says, that the act is broad enough to embrace transfers of this character, *but such could not have been the purpose of the act*, thus showing a relaxation from the holding of *Spofford vs. Kirk*.

(c) In *Bailey vs. The United States*, *supra*, it was held that payment of a claim by the government to an attorney in fact of the claimant, before it was properly allowed was good as against the claimant, notwithstanding the provisions of the statute in question.

Justice Harlan, during the course of his opinion, says, in referring to the *Erwin* and *Goodman* cases, *supra*, "that these cases show that the statute in question is not to be interpreted according to the literal acceptance of the words used. They show there may be assignments or transfers of claims against the government," which are not forbidden by this statute; and he repeats the doctrine of *Goodman vs. Niblock*, which holds that the purpose of the statute was to *protect the government and not the claimant* in his dealings with it; and says that the title of the Act suggests the purpose for which it was enacted, namely: "An Act to Prevent Frauds upon the Treasury of the United States."

In the same opinion he questions whether in passing the Act of 1853, Congress had at all in mind the protection of claimants.

(d) In *Hobbs vs. McLean*, *supra*, the question arose as to whether persons who became co-partners with one for the purpose of performing a contract the one had or was about to receive from the government were entitled to receive any part of the

moneys earned in the performance of the contract. It was claimed by the assignee in bankruptcy of the person to whom the contract was let that the formation of the partnership by which it was agreed the incoming partner would be entitled to share in moneys received from the government was a violation of the statute and hence they were not entitled to any of the moneys.

The Court, in its opinion, says: "When the contract of partnership was made, Peck (the contractor) had no claim which he could present for payment or on which he could have brought suit. He therefore had no claim the assignment of which the statute forbids. It is so clear that the articles of partnership do not constitute such an assignment as is forbidden that it would be a waste of words further to discuss the point."

Further commenting on the statute in question and a similar one the Court held that the articles of co-partnership did not *transfer* the contract or any interest in it and could not fairly be construed to do so, but if open to two constructions the presumption is that they were made in subordination to the statute and if they could be construed consistently with the statute, it was the duty of the Court to so construe them under the rule that where a contract is open to two constructions, one lawful and the other unlawful, the former must be adopted.

After again stating that the statutes were passed for the protection of the government the Court say: "*Their purpose was not to dictate to the contractor what they should do with the money received on his contract after the contract had been performed.*"

(e) In *Freedman's Savings & Trust Co. vs. Sheperd*, and *Sheperd vs. Thompson*, 127 U. S., 404, it was held that an assignment or a pledge of a demand against the United States for use and occupation of real property, although a claim against the U. S., was not void within the statute in question, *as it was the government and not the claimant that the statute protected*. The head note of this case, like the statement made of it in appellants' points, quite imperfectly digests it. A better digest of the same is found in the American Annual Digest for 1892, p. 726, and is as follows: "Where a demand for rent due from the United States is assigned as security before the claim has been allowed, the assignee may assert his rights against the persons named in warrants subsequently issued by the treasury department therefor, and against a mortgagee of the premises not entitled to the rents." The cases involved conflicting claims of a receiver, mortgagee, assignees and trustees to a considerable fund which arose from the rental to the government of certain real property, and which had been allowed by the government and existed in the form of drafts to the order of the lessor, one Bradley, to the use of certain trustees designated by him. After the making of the lease and certain pledges and assignments of the rent, the lessor conveyed the property to one Sheperd, one of his trustees, who, it seems, was the equitable owner of the property, and who, with said Bradley, assigned the rents to one Thompson to secure the payment to him of an indebtedness in his favor against Sheperd. The trial Court (a Federal Court) passed upon the conflicting claims and awarded the fund that was represented by said

drafts to said Thompson. On appeal it was insisted that the assignment or pledge of rent to Thompson was in violation of the statute in question. The Court said: "When the government ascertained
 " the amount of rent due under Bradley's lease and
 " with his consent allowed the same we
 " perceive nothing in the words or policy of the
 " statute preventing Thompson from asserting his
 " rights either against *the parties, or any of them,*
 " *named in the warrants issued by the government.*
 " The object of the statute was to protect the gov-
 " ernment and not the claimant and to prevent
 " frauds upon the treasury. The simple question is
 " whether the money received from the govern-
 " ment shall be diverted from the purpose to which
 " Bradley, Sheperd and Sheperd's trustee agreed in
 " writing it should be devoted, namely, the pay-
 " ment of the debts Thompson holds against Shep-
 " erd. This question must be answered in the
 " negative, and in so adjudging we do not contra-
 " vene the letter or spirit of the statute."

It will be seen that the principle involved in the case last cited is very similar to the one at bar. There the claims had been allowed and paid over and the controversy was between adverse claimants to it. Such is the precise fact here, and in this respect the cases are not distinguishable. It is true in that case that the government recognized the assignment (which it could not do if absolutely void) and paid over the money, while here no assignment was ever presented to it for recognition, but this difference in fact cannot change the legal principle involved. There the assignors had agreed in writing that the fund should go in a particular direction and the Court compelled them to keep their agree-

ment. Here Witherby & Gaffney, of the moneys to become due them, in effect agreed to pay the defendants in error for the very materials used by them for the government and then violated their agreement by paying the same to the plaintiffs in error. The language of the assignment does not in terms agree to pay the claim of defendants in error but we confidently submit that in law it amounts to an agreement to do so just as effectually as if it had been so written. On the whole the cases are alike and the decision considered should control here.

(f) In *Lawrence vs. United States*, 8 Ct. Claims, *supra*, it was held that the purpose of the Act must be restricted to matters before the U. S. Treasury.

The several cases cited show conclusively that all assignments of claims against the United States are not void, that the U. S. Supreme Court has receded from the strong position taken in *Spofford vs. Kirk*, that the decision in that case was put upon the ground that the claim assigned was in controversy between the government and the assignor, that it was not intended by congress to hamper or restrain ordinary, legitimate business transactions between citizens, that the claims contemplated by the statute were those pending or which might be brought in the Court of Claims, or before the Treasury Department, and that its sole purpose was to protect the government and not the claimants.

Applying to this case the principles laid down in the decisions cited, it is insisted that the assignment to defendants in error in no sense violated the provisions of the statute in question.

II.

Passing from the Federal to State Courts we find that the construction of the statute for which we contend has been quite uniformly sustained.

Wallace vs. Douglas, 116 N. C., 659.

Forest vs. Price, 52 N. J. Eq., 16.

Leonard vs. Whaley, 91 Hun (N. Y. Sup. Ct.) 304.

Jurnegan vs. Osborn, 155 Mass., 207.

Attention is particularly called to the case in 155 Mass. which overruled *Newell vs. West*, 149 Mass., 520. The case involved the validity of an assignment of a claim against the United States government for services performed in rescuing seamen in the Arctic seas.

The assignor, after the assignment, learning that his claim against the government had been allowed, repudiated his assignment, relying upon the section of the Revised Statute in question, and in passing upon the case the Court said :

“ The claim of the plaintiff that the assignment
 “ is invalid under §3477 of the U. S. Rev. Sts.,
 “ would seem to derive some support from *Newell*
 “ *vs. West*, 149 Mass., 520. But in that case the
 “ court relied in the main for this point upon *Spof-*
 “ *ford v. Kirk*, 97 U. S., 484. The statute has since
 “ been under consideration by the Supreme Court
 “ of the United States in other cases. *Goodman v.*
 “ *Niblock*, 102 U. S., 556. *Bailey v. United States*,
 “ 109 U. S., 432. *Hobbs vs. McLean*, 117 U. S.,
 “ 567. *Freedman's Savings & Trust Co. v. Shep-*
 “ *erd*, 127 U. S., 494. In *Goodman v. Niblock*, the
 “ Court says that there is no doubt that the sole
 “ purpose of the statute was to protect the govern-
 “ ment and not the parties to the assignment.

" This language is cited with approval in *Bailey v.*
 " *United States*, and the construction thus given to
 " the statute is further upheld in *Hobbs v. McLean*,
 " and more strongly still in the last reported case
 " which deals with the subject, viz: *Freedman's*
 " *Savings & Trust Co. v. Sheperd*. It is also said
 " in *Goodman v. Niblock* that the mischiefs which
 " the statute was designed to prevent were two:
 " First, the embarrassment to which the govern-
 " ment might be subjected by having several per-
 " sons instead of one perhaps to deal with, and
 " by the introduction of strangers to the trans-
 " actions; and, secondly, the introduction into the
 " prosecution of claims, often speculative and des-
 " perate, before Congress and the departments, of
 " the combinations and influences that might result
 " from multiplying the number of persons inter-
 " ested in them as owners. None of these consid-
 " erations affect the present case. The government
 " has paid over the money without objection to the
 " defendant Osborn, as agent and managing owner
 " of the *Europa*. The assignment by the plaintiff
 " to him of his interest in the claim was for the
 " purpose and as a part of a settlement between
 " them of all matters relating to the ship and voy-
 " age. Without undertaking to say that an as-
 " signor might not, under some circumstances,
 " *before the allowance of the claim*, disregarded his
 " assignment, we think the plaintiff cannot be per-
 " mitted to do it in this case."

Supplement the Massachusetts case by the lucid
 opinion in this case of Ch. J. Andrews of the New
 York Court of Appeals and it would seem that the
 construction of the statute for which the defendants
 in error contend is well settled and should be up-

held. Indeed, we believe we might rest the argument of the case in behalf of the defendants in error upon the opinion alone of the learned Chief Judge.

(a) But was the instrument executed by Witherby & Gaffney to the defendants in error an assignment of any claim they had against the government? I insist it was not, that it was but an *assignment of the moneys* to become due them on their contract with the government. By this assignment the defendants in error acquired nothing they could present to or enforce against the government, and such never was the intention of the parties. Beside this, at the time the assignment was made Witherby & Gaffney had no claim they could present to the government, or upon which they could sue, hence within the case of *Hobbs vs. McLean*, supra, nothing was assigned so far as the government was concerned. The rights and equities of the defendants in error ripened only when the moneys were paid by the government to Witherby & Gaffney, and at that instant the fund to the extent of \$2,500 became their property, the same as the fund in the *Freedman's Savings & Trust Company*, supra, case became Thompson's when it was awarded to Bradley. Upon the receipt of this money Witherby & Gaffney became simply trustees for defendants in error and the payment of it to and receipt by the plaintiffs in error were wrongful and unlawful.

It will be observed that no attempt was made to assign the contract of W. & G. or any interest in it, that there was no dispute between them and the government, and that the sole purpose of the transaction was to secure the defendants in error for material actually used by the contractors in per-

forming their contract with the government, and that the transactions between the parties really amounted to nothing more or less than the giving of security by a debtor to his creditor. This the Court will readily see and will not seek technical means to defeat a claim that is highly equitable; rather will it say that W. & G. had a right to assign the moneys to become due them in the future as such a course was upheld in *Hobbs vs. McLean*, supra, where it was said, "*the purpose of the statute was not to dictate to the contractor what he should do with the moneys received after the contract had been performed.*" The arrangements in this case between the contractors and the defendants in error can certainly admit of this construction, which is lawful, in preference to an unlawful one which would defeat a manifestly just claim. The construction of the statute asked by the plaintiffs in error is altogether too narrow and cannot be sustained on principle or in the light of the recent decisions cited.

The assignment in question directed the government's paying officer to make payments of the moneys coming to his hands on the contract of the defendant's in error, and for this reason it is argued that their assignment amounted to a claim against the government, which they sought to collect through such officer. The paying officer was not the government, nor the Treasury Department, nor the Court of Claims, and the words added to the assignment are merely surplussage.

(b) If one could conceive how the defendants in error claim to the moneys to become due from the government after they reached the contractor's hands could be presented to and litigated before the

Treasury there might be some plausibility in the construction of the statute for which plaintiffs in error contend. As it was not the claim or the contract that was assigned, but the moneys due and to become due from the government, it is submitted that this assignment was not one that could be litigated before the Treasury, and hence does not fall within the prohibition of the statute.

Several cases in the Court of Claims are relied on by the learned counsel for the plaintiffs in error as holding the construction of the statute for which they contend, but it will be seen by the titles of each that there were claims in which the United States was named as a defendant, and it is not contended by the defendants in error that the government may not refuse to recognize assigned claims, but that it will not do so in cases like this is supported by abundant authority. Our real contention here is, that as between citizens who have acquired vested rights by their voluntary acts in claims which have ^{been} allowed and over which there was no controversy, the courts never have allowed, and will not allow, the provisions of this act to intervene to divest such rights, and shield a party in the commission of a wrong. Moreover, several of the cases so relied on are authorities favorable to the defendants in error. Notably: *Lopez vs. U. S.*, 24 Ct. Ch., 84; see also *Dexter vs. Meggs*, 21 Atlantic R., 114. The case of *Newell vs. West*, if on plaintiff's brief, 149 Mass., 520, has been overruled, as already shown.

We must not lose sight of the fact that neither the government nor the contractors are parties to the action, or that the action is between rival claimants.

The cases of McKnight against United States, 98 U. S. R., 171, and St. P. & D. R. R. Co. vs. United States, 112 U. S. R., 733, cited by the plaintiff's in error, were claims directly against the government and in this respect are distinguishable from the case in hand, and the concession is already made that the government may at any time refuse to recognize the assignment of any claim against it.

The later cases of Butler vs. Gorley, 126 U. S. R., 303, and Hager vs. Swayne, 149 U. S. R., 242, seem to some extent to be relied upon to overthrow the decisions of the New York Courts. It requires but a brief examination of these cases to show that they in no way interfere with Goodman vs. Niblock and other cases cited upon which the New York Courts relied. The case of Butler vs. Gorley repeated what already had been held, to wit: that an assignment by operation of law to an assignee in insolvency was not within the prohibition of the statute; and the case of Hager vs. Swayne was an action brought by Swayne, who had become assignee of the claim, to recover from Hager as collector of the port of San Francisco, duties illegally collected by him. In the latter case Ch. J. Fuller, in commenting upon the statute, goes no further than previous decisions went upon the same question.

(c) Since the decision of case at bar by the New York Court of Appeals, the cases of Prairie State Bank vs. United States, and United States vs. Hitchcock (164 U. S. R., 227) were before this Court and decided in November, 1896. The question there involved was whether the surety for a contractor with the United States, who was obliged to perform the contract of his principal, after he

had defaulted, in erecting a custom house at Galveston, or a bank which had received an assignment from the contractor on the faith of advances made by it of the fund that would finally become due from the government should receive the final payment for the construction of the custom house. The surety had no knowledge of the advances made by the bank, or of its authority from the contractor to receive the fund. Both the bank and surety by separate actions sought to recover the reserved sum from the government. The cases were heard together, and it was held that the rights of the parties to the fund were equitable only, and that the equity of the bank having been acquired subsequent to the liability incurred by the surety was subordinate to the surety's right, and he was allowed in equity to recover the fund.

The case is not unlike the present one in its equitable features. Here as there neither party could take an assignment of the contract or claim against the government, but could claim an equitable right to the fund after it had been created; and following well settled principles, the Court there held, as it will here, that the assignment first in point of time carried with it the first or higher equity to it. The case, I contend, is controlling authority, and one which will speedily lead to a decision of this case in favor of the defendants in error.

(d) There can be no claim made here by the plaintiff in error, Conde, that he became subrogated to the rights of Witherby & Gaffney in the fund in question. While Conde was one of the sureties to the bond of Witherby & Gaffney, he was not called

upon by the government to complete the contract, as was done in the *Prairie State Bank* cases cited, he was only an endorser with Streeter for the benefit of the contractors, and no claim to the right of subrogation has ever been and cannot now be made by him.

III.

Unless the statute stood in the way, it is not disputed that the instrument executed by Witherby & Gaffney to the defendants in error in equity transferred to them \$3,000 of the moneys which they were to receive from the government. If authorities be needed for this proposition, see

Field v. The Mayor, 6 N. Y., 179.

Hutchins v. Hebbard, 34 N. Y., 24.

Develin v. The Mayor, 63 N. Y., 8.

People ex rel Dannat v. Comptroller, 77 N. Y., 45.

Brill v. Tuttle, 81 N. Y., 454.

Jones v. The Mayor, 90 N. Y., 387.

Story's Equity Jur., §§ 1040, 1040b, 1055.

(a) And it makes no difference that the assignment was for moneys to become due or that the moneys assigned had not come into existence.

Taylor v. Bates, 5 Cow., 376.

Patterson v. Hall, 9 Cow., 747.

Morton v. Naylor, 1 Hill, 589.

Field v. The Mayor, 6 N. Y., 179.

(b) Witherby & Gaffney had no power to revoke the assignment or to change or interfere with the rights of the defendants in error under it.

DeForrest v. Bates, 1 Ed., Ch. 393.

Hutchins v. Hebbard, 34 N. Y., 24.

(c) No acceptance of such an assignment is necessary.

Ballou v. Boland, 14 Hun, 355.

Barse v. Morton, 43 Hun, 479.

Parker v. Syracuse, 31 N. Y., 376.

(d) The assignment was simply an ordinary business transaction, which is now sanctioned by law as well as equity as has already been shown.

(e) The action was properly brought to recover the amount unpaid on the assignment. During the progress of the case no question to the contrary has been made.

Fairbanks vs. Sargent, 104 N. Y., 108. And again
117 N. Y., 320.

IV.

This Court, we believe, will not examine the exceptions taken by the plaintiffs in error on the trial of the case, as the Supreme Court and Court of Appeals of the State of New York have passed upon them adversely to their contention.

The judgment should be affirmed with costs.

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